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No. _____

Supreme Court, U.S.
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In the
Supreme Court of the United States
October Term, 1990

WISHING WELL LIMITED PARTNERSHIP,

Petitioner,

v.

SECURITY PACIFIC BUSINESS FINANCE COMPANY,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

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EDITOR'S NOTE:

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QUESTIONS PRESENTED

1. Whether service of a motion for relief under 11 U.S.C. § 362(d) on a debtor's attorney, and not the debtor, is sufficient to grant jurisdiction for the purposes of the motion over the debtor.

2. Whether foreclosure of a mortgage by advertisement, and subsequent purchase of the property by a creditor with full knowledge of the appeal and notice of lis pendens filed against the property, moots an appeal of the bankruptcy court order lifting a stay to allow foreclosure.

TABLE OF CONTENTS

Page

QUESTIONS PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES iv

OPINIONS BELOW 1

JURISDICTIONAL STATEMENT 2

STATUTES AND RULES 2

STATEMENT OF THE CASE 2

REASONS FOR ISSUING THE WRIT 5

I. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER COURTS. 6

A. The Eleventh Circuit's Decision Conflicts With A Decision Of The Ninth Circuit As To The "Mootness" Rule. 6

B. The Eleventh Circuit's Decision Conflicts With Decisions Of Texas District Courts As To The "Mootness" Rule. 8

II. THE ELEVENTH CIRCUIT'S DECISION DISREGARDS THE PLAIN LANGUAGE OF THE APPLICABLE RULES AND STATUTES. 9

A. Nothing In The Bankruptcy Rules Allows For "Actual" Notice to a Debtor In Lieu of Formal Notice. 10

B. The Bankruptcy Court Could Not Hear This Matter In The Absence Of Proper Service On The Debtor. 13

III. THE ELEVENTH CIRCUIT'S DECISION UNDERCUTS THE POLICY OF THE BANKRUPTCY RULES. 14

CONCLUSION. 15

APPENDIX. . . . . . (Follows page 16)

TABLE OF AUTHORITIES

CASES

Aetna Business Credit, Inc. v. Universal Decor & Interior Design, Inc., 635 F.2d 434 (5th Cir. 1981) 14

American Grain Association v. Lee-Vac, Ltd., 630 F.2d 245 (5th Cir. 1980) 8

Consumer Protect Safety Commission v. GTE Silvania, Inc., 447 U.S. 102, 108 (1980) 9

In re Brown, 7 B.R. 486 (Bankr. N.D. Ga. 1980) 11

In re Rogowski, 115 B.R. 409 (Bankr. D. Conn. 1990) 13

In re Sun Valley Ranches, Inc., 823 F.2d 1373, 1374 (9th Cir. 1987) 6-8

In re Valeu, 53 B.R. 549, 554 (Bankr. D.N.D. 1985) 14

Kananen v. Matthews, 555 F.2d 667, 670 (8th Cir.), *cert. denied sub. nom., Kananen v. Califano*, 434 U.S. 939 (1977) 10

Matter of Cada Investments, Inc., 664 F.2d 1158, 1160 (9th Cir. 1981) 6

Matter of First Mortgage Atrium Building Ltd., 92 B.R. 202 (E.D. Tex. 1988) 8, 9

Matter of Siegler Bottling Co., 65 B.R. 117 (Bankr. S.D. Ohio 1986) 13

Matter of Springpark Associates, 623 F.2d 1377 (9th Cir.), *cert. denied*, 449 U.S. 956 (1980) 6

Matter of Wildman, 30 B.R. 133, 10 B.C.D. 668 (Bankr. N.D. Ill. 1983) 10

Miami Center Limited Partnership v. Bank of New York, 838 F.2d 1547 (11th Cir. 1988) 6

Reliable Electric Co., Inc. v. Olson Construction Co., 726 F.2d 620 (10th Cir. 1984) 13

Sullivan Central Plaza I Ltd. v. Bancboston Real Estate Capital Corp., 106 B.R. 931 (N.D. Tex. 1989) 9

United States v. Standard Brewery, Inc., 251 U.S. 217 (1920) 10

CONSTITUTIONAL PROVISIONS

U.S. Constitution, Amendment V 2, 13, 14

STATUTES

11 U.S.C. § 362(d) 2

28 U.S.C. § 1254(1) 2

RULES

Bankruptcy Rule (Former) 805 6

Bankruptcy Rule 4001 ..... 2, 11

Bankruptcy Rule 4001(a)(1) 10

Bankruptcy Rule 7004 ..... 2, 10, 12, 13

Bankruptcy Rule 7004(b)(9) 5, 10-12, 15

Bankruptcy Rule 9014 ..... 2, 10, 11

Bankruptcy Rule 9024 4

Federal Rule of Civil Procedure 60(b) 2-4

Federal Rule of Civil Procedure 60(b)(4) 4

APPENDIX

Decision and Judgment (8th Circuit, March 7, 1991) ..... App. 1

Order of the District Court (N.D. Ga., March 26, 1990) ... App. 2

Order of the District Court in *Briarwood-Arrowana Limited Partnership* (N.D. Ga., August 17, 1989) ..... App. 3

Order Vacating Automatic Stay (Bankr. N.D. Ga., April 7, 1989) ..... App. 4

Order of the Bankruptcy Court (Bankr. N.D. Ga., September 7, 1989) ..... App. 5

Appendix of Constitutional Provision, Statutes, and Rules .. App. 6

Brief of Appellee Security Pacific Business Finance, Inc. (undated) ..... App. 7

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IN THE

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October Term, 1990

WISHING WELL LIMITED PARTNERSHIP,

Petitioner,

v.

SECURITY PACIFIC BUSINESS FINANCE COMPANY,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

Petitioners respectfully pray that a writ of certiorari issue to review the per curiam judgment of the United States Court of Appeals for the Eleventh Circuit entered in this proceeding on March 7, 1991.

OPINIONS BELOW

The summary affirmation of the Eleventh Circuit Court of Appeals is reported at 929 F.2d 706 and is set forth in Appendix 1. The unreported order of court, dated March 26, 1990, which dismissed the appeal of the bankruptcy court's order as moot, is set forth in Appendix 2. The unreported order of the court in the related case of *Briarwood Arrowana-Limited Partnership v. Security Pacific Business Finance, Inc.*, File No. 1:89-CV-929-HTW, dated August 17, 1989, is set forth in Appendix 3. The unreported order of the bankruptcy court,

vacating the automatic stay as to certain real property, dated April 7, 1989, and the related unreported order dated September 7, 1989, are set forth as Appendices 4 and 5.

JURISDICTIONAL STATEMENT

The judgment of the Court of Appeals for the Eleventh Circuit was entered March 7, 1991. This petition for certiorari is being filed within ninety days of that date. This Court's jurisdiction is invoked pursuant to 28 U.S.C. § 1254(1).

STATUTES AND RULES

The case involves the Fifth Amendment to the U.S. Constitution, provisions for relief from the automatic stay at 11 U.S.C. § 362-(d); Federal Rule of Civil Procedure 60(b); Bankruptcy Rules 4001, 7004, and 9014. Because of the length of the constitutional provision, statutes, and rules, their text is set forth in Appendix 6.

STATEMENT OF THE CASE

Petitioner is a Minnesota limited partnership which owns rental property in Georgia. The corporate general partner of the limited partnership is Wishing Well G.P., Inc. R.D. Estes, at all times relevant, was president, and E. Burke Hinds was secretary of Wishing Well G.P., Inc. Both are Minneapolis attorneys who were, at the time of the incidents giving rise to this controversy, a partner and an associate in the Minneapolis law firm of Estes Parsinen & Levy, P.A.

Petitioner filed a petition under Chapter 11 of the Bankruptcy Code in Minneapolis on December 30, 1988. Appendix 3 - 2. On the bankruptcy petition, the debtor's address was given as:

Wishing Well G.P., Inc.
c/o R.D. Estes
100 South Fifth Street
Suite 1100
Minneapolis, Minnesota 55402

The debtor's attorney was listed in the petition as:

David A. Orenstein, Esq.
Estes Parsinen & Levy P.A.
100 Fifth Street
Suite 1100
Minneapolis, Minnesota 55402

The petition was signed by R.D. Estes as "president of Wishing Well G.P., Inc., its corporate general partner."

Venue was transferred to Atlanta on February 9, 1989. Transfer of the case in bankruptcy takes some time. Appendix 3 - 2. On March 16, 1989, before the transfer was entirely complete, respondent filed a "Motion to Lift Stay for Defaults, or for Appointment of a Trustee or Dismissal, and Objection to Use of Cash Collateral" ("March 16th motion"). *Id.* The motion papers were served on debtor's attorney at the address given in the petition, but the motion papers were not served on the debtor or the debtor's general partner. *Id.* at 2-3.

Petitioner never received timely notice of the hearing on the motion to lift the stay. Respondents have admitted as much in their pleadings below. Appendix 7 - 10-11. What is at issue is when actual notice of the hearing was given, and there is substantial confusion even in respondent's various representations to the courts below as to what took place. Respondent's original position was that it had attempted to contact petitioner, but was unable to do so. Petitioner attempted to vacate the lifting of the stay since the order was void under Federal Rule of Civil Procedure 60(b). At the Rule 60(b) motion hearing, respondent's counsel said that, on March 31, 1989, one working day before the hearing, counsel for respondent was able to reach David A. Orenstein, the attorney of record for petitioner. Orenstein suggested that respondent's counsel talk to the secretary of petitioner, Mr. Hinds. The subsequent conversation was apparently the first notice petitioner had of the hearing on the motion to lift the stay.

At the April 3, 1989, hearing on the March 16th motion, petitioner was not represented. This is understandable, as petitioner

had less than one full working day to find local counsel for a hearing it found out about only outside of the formal notice procedure. Based on petitioner's failure to appear at the hearing, and on respondent's representations that there had been no contact with petitioner despite attempts, and without considering any evidence at all, the bankruptcy court lifted the automatic stay. The court's order was entered on April 11, 1989, and respondent scheduled a May 2, 1989, foreclosure.

Petitioner filed a motion, pursuant to Bankruptcy Rule 9024 and Federal Rule of Civil Procedure 60(b)(4) to vacate the order lifting the automatic stay. A hearing on that motion was held on May 2, 1989.

The bankruptcy court denied petitioner's Rule 60(b) motion from the bench. No testimony was taken. Based only on the arguments of counsel, the bankruptcy court found that, although formal notice was not given to the petitioner, the petitioner had "actual notice." The bankruptcy court stated that notice "to the debtor's counsel of record and actual telephonic notice to the debtor are sufficient." Appendix 5 - 2.

Petitioner filed a notice of lis pendens on the property at issue here. On May 2, 1989, immediately following the bankruptcy court's oral ruling, petitioner filed a notice of appeal. A related case, *In re Briarwood Arrowana Limited Partnership*, was appealed at the same time. The district court refused to grant a stay pending appeal. For reasons which are not germane to this petition, the Briarwood case was decided several months before this matter. Appendix 3.

Following briefing and argument, the district court dismissed the appeal as moot. Relying on a controversial Eleventh Circuit line of cases, the court held that, in all cases where a stay pending appeal of foreclosure is not granted, and a creditor foreclosures, the appeal is mooted as to that real estate. This is true even if the creditor, who is a party to the proceedings, purchases at the foreclosure sale, and is true even if the purchaser at the foreclosure sale had notice of the ongoing dispute. In this case, respondent purchased the property at the foreclosure sale, and the notice of lis pendens filed on the property

gave notice to the world that the order of the bankruptcy court was in dispute.

The district court also held that the "actual" notice, given the secretary of the corporate general partner one working day before the hearing on the motion to lift the stay, was sufficient as a matter of law to confer jurisdiction for the purposes of that motion. The district court relied on the fact that the address for the corporate general partner and the address for its attorney of record were the same, and therefore notice to the debtor's attorney was the same as notice to the debtor, despite the plan language of Bankruptcy Rule 7004(b)(9).

The district court also misunderstood petitioner's "jurisdiction" argument. Petitioner argued that, because of faulty and improper service of the motion, the bankruptcy court did not have jurisdiction over the particularized subject matter of that motion. That is, because petitioner did not have formal notice of the motion hearing, the court could not, consistent with due process, hear a motion which divested petitioner of a property right.

Instead, the district court chose to treat the "jurisdiction" question as a matter of whether the bankruptcy court had jurisdiction over the debtor for the purposes of the matter as a whole. The court, correctly, found that it had subject matter jurisdiction over petitioner, and in rem jurisdiction over the property which was the principal asset of the estate. Unfortunately, that was not the issue before it. The court did not address whether, consistent with due process, the bankruptcy court had jurisdiction over petitioner for the purposes of this motion, given the admittedly faulty service.

Petitioner appealed to the Eleventh Circuit Court of Appeals. A panel of the Eleventh Circuit affirmed the district court, without opinion and *per curiam*. Appendix 1. Petitioner now prays that a writ of certiorari issue to review the Eleventh Circuit's decision.

REASONS FOR ISSUING THE WRIT

I. THE ELEVENTH CIRCUIT'S DECISION CONFLICTS WITH DECISIONS OF OTHER COURTS

A. The Eleventh Circuit's Decision Conflicts With A Decision Of The Ninth Circuit As To The "Mootness" Rule.

A body of law has grown up, in the Eleventh Circuit and elsewhere, which holds that an appeal is moot after a foreclosure sale has occurred, since the court then can offer no effective relief. Effective relief is foreclosed because it would be unfair to divest an innocent third party purchaser, which purchased without knowledge of the dispute between the debtor and creditor, of a fairly obtained interest in property. In such cases, it is the general consensus that hardship to the innocent purchaser far outweighs the hardship to the foreclosed debtor.

Circuit Courts of Appeal are split on whether or not there should be an exception to this rule. In *In re Sun Valley Ranches, Inc.*, 823 F.2d 1373, 1374 (9th Cir. 1987), the court identified a "narrow exception to this rule" in cases where real property is sold to a creditor who is a party to the appeal. In such a case, all essential parties are before the court, and no problem of mootness arises. Unlike the case where a nonparty purchases at a foreclosure sale, it is not impossible for the court to fashion some sort of relief when a party purchases. *Id.* See also, *Matter of Springpark Associates*, 623 F.2d 1377 (9th Cir.), cert. denied, 449 U.S. 956 (1980); *Matter of Cada Investments, Inc.*, 664 F.2d 1158, 1160 (9th Cir. 1981).

The Eleventh Circuit does not recognize a similar exception. In *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir. 1988), the court addressed an argument that the "mootness rule has no applicability because there has been no transfer to a third party." *Id.* at 1554. The court analyzed the intent of (former) Bankruptcy Rule 805. The court held that the "rule does not

distinguish between mortgage holders and other potential purchasers of encumbered property. It is designed to give finality to orders of the bankruptcy court that have not been stayed pending appeal." *Id.* at 1554. The Eleventh Circuit rejected the exception recognized in *Sun Valley*.

This conflict in authority is outcome-determinative. In this case, respondent was, to all intents and purposes, the only creditor of the bankruptcy estate. It had commenced proceedings which were, at least in part, adversary, and was aware, at every step in the proceedings, that its purchase of the property was subject to serious and appealable procedural flaws. Like the creditor in *Sun Valley*, respondent here has constantly been "before the court" and the court could certainly fashion some relief without undue hardship to respondent.

This case is even more compelling because of the existence of the notice of lis pendens. Respondent (and, in fact, the rest of world) has been on notice at every step in the proceeding that the appeal process was ongoing. Respondent did not purchase the property innocent of the fact that, if an appeal went against it, it would be forced to divest itself of the property. Although respondent argued in the courts below that it had "accepted liability" on the properties, and expended energy in managing the property, it put itself in that position by proceeding with a foreclosure while an appeal was pending. Practically, respondent could have avoided this exposure easily by requesting a receiver.

This case aside, there are serious policy flaws in the Eleventh Circuit's reasoning. In a case such as this one, where the bankruptcy estate has one asset, the bankruptcy court can, by refusing to a grant a stay pending appeal, effectively deprive a debtor of the rights of the Bankruptcy Code. That in fact happened in this case: petitioner filed for bankruptcy, respondent moved to lift the stay immediately after, or even during, the time during which the venue of the case was transferred, a stay during the appeal was not allowed, and the property was foreclosed upon and purchased by respondent. If the Eleventh Circuit is correct, that series of events has removed petitioner from the protection of the Bankruptcy Code. Since any appeal will be moot, the

refusal to grant a stay pending appeal will constitute a final determination of the debtor's fate. This sort of summary disposition was not intended by the Bankruptcy Code, and cannot be the correct result. Only the exception, recognized by the Ninth Circuit, can soften this result.

Respondent simply is not the party which the mootness rule was envisioned, or ought, to protect. Respondent was aware of the risks it took when it purchased the property, and now it must live with the fact that those risks have matured. If this important issue were decided under the case law of the Ninth Circuit, respondent would be forced to give up the foreclosed property. Since this arose in the Eleventh Circuit, respondent is free to act in blithe unconcern for the consequences of a successful appeal against it. The conflict between the circuits is complete, and this court should grant a writ of certiorari to determine which court's view ought to prevail.

B. The Eleventh Circuit's Decision Conflicts With Decisions Of Texas District Courts As To The "Mootness" Rule.

In addition to the *Sun Valley* decision of the Ninth Circuit, several district courts in other jurisdictions have found the Eleventh Circuit rule too harsh. Several courts have looked at the purpose of the rule, rather than being guided by it without further inquiry, and decided that the mootness rule requires an exception in order to be administered fairly.

In *Matter of First Mortgage Atrium Building Ltd.*, 92 B.R. 202 (E.D. Tex. 1988), the court examined the origins of the mootness rule in dealing with a case similar to the present case. It held that the mootness rule "originally derived from general principles of appellate jurisdiction, that is, if, pending an appeal, an event occurs which renders it impossible for the appellate court to grant any relief or renders a decision unnecessary, the appeal is moot." *Id.* at 203. The court also found that the need for finality for a purchaser at a foreclosure sale underscored bankruptcy's mootness rule.

The court, finding no Fifth Circuit guidance, examined the Ninth Circuit and Eleventh Circuit rules, and criticized the Eleventh

Circuit. Looking at "very significant dicta" in a Fifth Circuit case, *American Grain Association v. Lee-Vac, Ltd.*, 630 F.2d 245 (5th Cir. 1980), the Texas court found that its Circuit "seems to approve of an exception to the mootness rule when the parties necessary to the granting of relief were before the appellate court." *Id.* at 206.

The court determined from this that the Fifth Circuit "would frame the mootness rule as follows: if a debtor fails to obtain a stay pending appeal and foreclosure occurs, an appellate court will not grant relief having the effect of reversing the foreclosure, unless the creditor who purchased real property at foreclosure is a party to the appeal and statutory rights of redemption exist under applicable state law." *Id.* at 207. In that case, the court held that under Texas law a statutory right of redemption did not exist, but the reasoning is important nonetheless, and applicable directly to this appeal.

Another Texas court considered the same issues in *Sullivan Central Plaza I Ltd. v. Bancboston Real Estate Capital Corp.*, 106 B.R. 931 (N.D. Tex. 1989). The court there examined the *First Mortgage* case, and adopted that court's reasoning. *Id.* at 933. There, too, the court found that there was no right of redemption under Texas law, and dismissed the appeal.

These cases, from two Fifth Circuit courts, give a strong indication that the Fifth Circuit would join the Ninth Circuit in creating an exception to the mootness rule in cases where, as here, the creditor purchases at the foreclosure sale. The traditional concerns, of the appellate court not being able to fashion relief, are not present when a creditor is fully aware of the pendency of the appeal, and takes subject to its results. There is a clear conflict between the Eleventh Circuit and certain Fifth Circuit courts on this issue, and this Court should issue a writ of certiorari to resolve the conflict.

II. THE ELEVENTH CIRCUIT'S DECISION DISREGARDS THE PLAIN LANGUAGE OF THE APPLICABLE RULES AND STATUTES

Absent a clearly expressed legislative intent to the contrary, the language of a statute must ordinarily be regarded as conclusive.

Consumer Protect Safety Commission v. GTE Silvania, Inc., 447 U.S. 102, 108 (1980). In construing a statute, the statute's meaning must be sought first from the language employed. If the language itself is plain, it is the duty of a court to enforce the statute as written. *United States v. Standard Brewery, Inc.*, 251 U.S. 217 (1920). If the wording of a statute is plain, simple, and straightforward, the words employed must be accorded their normal meaning. *Kananen v. Matthews*, 555 F.2d 667, 670 (8th Cir.), *cert. denied sub. nom., Kananen v. Califano*, 434 U.S. 939 (1977); see also *Helvering v. Hammel*, 311 U.S. 504, 510-11 (1941). The Bankruptcy Rules have the force of a statute. *Matter of Wildman*, 30 B.R. 133, 10 B.C.D. 668 (Bankr. N.D. Ill. 1983).

A. Nothing In The Bankruptcy Rules Allows For "Actual" Notice To A Debtor In Lieu Of Formal Notice.

Bankruptcy Rule 4001(a)(1) provides that a motion seeking relief from the automatic stay shall be made in accordance with Bankruptcy Rule 9014. Bankruptcy Rule 9014 is the rule which governs contested matters. The rule provides, in part, that any "motion shall be served in a manner provided for services of summons and complaints by Bankruptcy Rule 7004."

Bankruptcy Rule 7004(b)(9) requires service upon a debtor to be made by "mailing copies of the summons and complaint to the debtor at the address shown on the petition or statement of affairs, and, if the debtor is represented by the attorney, to the attorney at the attorney's post office address."

Bankruptcy Rule 9014 provides that other bankruptcy rules will also apply to a contested matter "unless" the court directs otherwise. The court's discretion under Bankruptcy Rule 9014 to "direct otherwise," however, does not apply, on its face, to service under Rule 7004. Service of the March 16th motion had to be made pursuant to Bankruptcy Rule 7004 even if the only relief it sought was relief from the automatic stay.

The attorney for petitioner was served with notice of the March 16th motion, but petitioner itself was not served. Respondent

conceded as much in its original district court brief, where it stated that it "failed to comply" with the technical aspects of 7004(b)(9).

Both the bankruptcy court and the district court in this case ignored the plain language of the statute, and, incorrectly, found that although petitioner did not have formal notice of the hearing, it had "actual" notice. The bankruptcy court held that notice "to the debtor's counsel of record and actual telephonic notice to the debtor are sufficient under the circumstances here." Appendix 5 - 3. The district court found that "the actual notice of the motion, which the bankruptcy court found to exist, was sufficient for that court to make a ruling on the motion for relief from the stay. This court does not conclude that the bankruptcy court erred in finding that the notice in this sort of proceeding [sic]." Appendix 3 - 4.

In so determining, the two lower courts ignored their own precedent. In *In re Brown*, 7 B.R. 486 (Bankr. N.D. Ga. 1980), the court addressed a similar situation. Because service of process was made on a defendant's attorney but not on the defendant himself in an adversary proceeding, the defendant had not been properly served, and there was no jurisdiction over him even though he received actual notice of the claim and the relief sought. The court found that failure to serve a party is not an insubstantial error, and was in fact prejudicial to the party.

In analyzing *Brown*, the bankruptcy court here again confused jurisdiction for the purposes of determining the case as a whole and jurisdiction for the purposes of a motion. The bankruptcy court found that "jurisdiction should not be the focus of inquiry here, particularly as the indebtedness and obligations arising thereon were nonrecourse . . . the matter is in the nature of an in rem action." Appendix 5 - 3. The court found, in effect, that the proceeding before it was not an adversary or contested proceeding, despite the clear language of the rule treating it as such.

Bankruptcy Rule 4001 states that a "motion for relief from an automatic stay provided by the Code shall be made in accordance with Rule 9014." Bankruptcy Rule 9014 deals with contested matters and states that "relief shall be requested by motion, and reasonable notice

and opportunity for hearing shall be afforded the party against whom the relief is sought . . . The motion shall be served in the manner provided for service of a summons and complaint by Rule 7004." Rule 7004(b)(9) states that service of such a motion must be upon the debtor and, "if the debtor is represented by an attorney, to the attorney at" its place of business. Nothing in any of these Rules allows for any notice other than formal notice.

Respondent argued below, and the bankruptcy court and district court apparently accepted, that the fact that respondent's counsel had contacted the secretary of petitioner's corporate general partner less than one working day before the hearing constituted "actual notice." Even if actual notice were allowed, notice of less than a full working day cannot seriously be held to be sufficient actual notice to satisfy the bankruptcy rules. In the real world, it is impossible to get adequate representation in a foreign jurisdiction on a Friday afternoon for a Monday hearing. At the very least, any purported "actual notice" should recognize these practicalities.

Respondent below also argue that since debtor's address on the petition and the address of debtor's attorney of record were the same office, Rule 7004(b)(9) does not apply in this case. No such exception to the Rule exists, either on the face of the Rule or in any case construing it. Although the fact that petitioner's corporate general partner and its attorney of record occupied the same floor in a downtown office building might, in some cases, guarantee that notice would be given, it does not in all cases, and it did not in this case. There is no evidence which has been adduced below that petitioner's attorney conferred with petitioner about the pendency of this hearing. In fact, the results of this conversation with Mr. Hinds, as reported by respondent's attorneys below, indicate that petitioner was not aware of the pending hearing.

The provisions of Rule 7004(b)(9) are to ensure that, when a party uses the privilege of service by first class mail, a privilege not allowed by Federal Rule of Civil Procedure 4(b), every possible line of communication to the debtor and the debtor's representative is used. Rather than requiring personal service, Rule 7004(b)(9) allows an adversary the unusual convenience of service by first class mail; this

convenience comes at a price, and respondent did not pay that price in this case. In today's environment of major law firms of hundreds of attorneys, it is disingenuous to argue that notice to one member of a firm is de facto notice to an independent business conducted by another member of the firm. If such an exception, in derogation of the rights of attorneys to conduct nonlegal business, were intended, congress would have included it in Rule 7004.

Nothing in the Bankruptcy Rules, as presently constituted, provides for "actual" notice outside of formal notice required within the Rules. The Eleventh Circuit's decision disregards the plain language of the applicable rules, and this court should grant a writ of certiorari to reconsider the Eleventh Circuit's decision.

B. The Bankruptcy Court Could Not Hear This Matter In The Absence Of Proper Service On The Debtor.

In motion practice, failure to serve a motion properly means that, for the purposes of the motion, the court does not have jurisdiction. Issues of "in personam" or "in rem" jurisdiction are irrelevant; the question is whether sufficient notice of proceedings against a party had been given to satisfy due process. In this case, petitioner received "actual" notice less than a full business day before the hearing. Due process was not satisfied.

The Fifth Amendment to the U.S. Constitution states that "no person shall be . . . deprived of life, liberty, or property, without due process of law." In bankruptcy proceedings, as in other federal proceedings, denial of an opportunity to be heard in a contested hearing constitutes a denial of due process. *Reliable Electric Co., Inc. v. Olson Construction Co.*, 726 F.2d 620 (10th Cir. 1984); *Matter of Siegler Bottling Co.*, 65 B.R. 117 (Bankr. S.D. Ohio 1986). One bankruptcy court has considered whether "actual" notice, as opposed to formal notice, of a hearing date would violate the due process clause of the Fifth Amendment, and has determined that it would. *In re Rogowski*, 115 B.R. 409 (Bankr. D. Conn. 1990).

Other courts have used a common sense approach to determine that, in the absence of notice to an adverse party, action on a motion

is void. *See Aetna Business Credit, Inc. v. Universal Decor & Interior Design, Inc.*, 635 F.2d 434 (5th Cir. 1981). In another case with a service defect identical to the defect in this case, the court found that service on the debtor's counsel but not the debtor was so defective as to leave the court without "jurisdiction over the debtors who are defendants." *In re Valeu*, 53 B.R. 549, 554 (Bankr. D.N.D. 1985).

For the bankruptcy court to act without proper formal notice to petitioner in this action deprived petitioner of its due process rights. The court had no more right to act without notice here than a court would have to act without notice in a summary judgment motion or any other motion affecting the rights of the parties. Quite simply, in a very real sense, petitioner here was deprived of a right to be heard by respondent's failure to effect proper formal service.

If the decisions of the courts below are allowed to stand, it will set a precedent in absolute derogation of the right to due process guaranteed by the Fifth Amendment to the Constitution. In cases of this sort, Congress has dictated the process which is due to a debtor in a contested matter. To deprive debtor of that congressionally mandated notice period, and substitute for it an amorphous (and in this case ineffective) period of "actual" notice, is not giving petitioner or any debtor the process which has been guaranteed to it. The Eleventh Circuit's decision in this matter ratifies a deprivation of due process, and this court should issue a writ of certiorari to review that decision.

III. THE ELEVENTH CIRCUIT'S DECISION UNDERCUTS THE POLICY OF THE BANKRUPTCY RULES

Congress has enacted Bankruptcy Rules, and the Bankruptcy Code generally, to guarantee that debtors be given an opportunity to reorganize their affairs so as to continue in business if possible. The actions of the lower courts in this case act contrary to that purpose.

This case is a perfect example of how ignoring Bankruptcy Rules can serve to subvert the bankruptcy process altogether. Here, petitioner was a business with a single asset, a piece of real property.

Without notice and without a hearing, the bankruptcy court acted to deprive petitioner of that asset. When petitioner acted to remedy the situation, the bankruptcy court found that although the Bankruptcy Rules had not been followed, "actual" notice had been provided, even though it was notice provided less than one day before the hearing. Without a stay pending appeal, respondent foreclosed upon the property, and purchased it. Because respondent purchased the property, under the unremitting Eleventh Circuit standard, the appeal to this district court was moot, and petitioner was without a remedy.

Petitioner was left, by misapplication of the Bankruptcy Rules and a harsh interpretation of the mootness rule, in exactly the same position it would have been in had it not filed for protection under Chapter 11. This result cannot have been intended by congress in enacting the Bankruptcy Rules and the Bankruptcy Code. This Court should grant a writ of certiorari to examine the Eleventh Circuit's ruling here in light of effectuation of congress' policies in enacting the Bankruptcy Code.

CONCLUSION

The decision of the Eleventh Circuit, and the decisions of the lower courts which it affirmed, should be reconsidered by this Court. A clear conflict between the Ninth and Eleventh Circuits, and between certain Fifth Circuit courts and the Eleventh Circuit which is dispositive in this action, exists concerning exceptions to the "mootness" rule. The bankruptcy court acted improperly by ignoring the clear dictates of Bankruptcy Rule 7004(b)(9), and by doing so, deprived petitioner of due process rights. These decisions are contrary to the intent of the bankruptcy law. For all these reasons, a writ of certiorari should issue to review the judgment and opinion of the Eleventh Circuit.

Respectfully submitted,

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APPENDIX 1 [DO NOT PUBLISH]

IN THE UNITED STATES COURT OF APPEALS FOR THE ELEVENTH CIRCUIT

No. 90-8369
Non-Argument Calendar

D. C. Docket No. 1:89-CV-930-HTW

IN RE: WISHING WELL-LIMITED PARTNERSHIP,

Plaintiff-Appellant,

versus

SECURITY PACIFIC BUSINESS FINANCE, INC.,

Defendant-Appellee

Appeal from the United States District Court
for the Northern District of Georgia

(March 7, 1991)

Before TJOFLAT, Chief Judge, BIRCH and DUBINA, Circuit Judges.

PER CURIAM:

AFFIRMED. See 11th Cir. R. 36-1.
"Costs taxed against plaintiff-appellant."

Judgment Entered: March 7, 1991
For the Court: Miguel J. Cortez, Clerk

By: /s/ Karleen McNabb
Deputy Clerk

ISSUED AS MANDATE: Apr -3 1991

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

WISHING WELL-LIMITED PARTNERSHIP,

Appellant,

vs. CIVIL ACTION
FILE NO.1:89-CV930-HTW

SECURITY PACIFIC BUSINESS FINANCE, INC.,

Appellee.

ORDER OF COURT

This matter is currently before the court on appeal from the oral order of the bankruptcy court entered on May 2, 1989 denying appellant's Emergency Motion to Set Aside Order. This court has jurisdiction of this matter pursuant to 28 U.S.C. § 158(a).

Appellant states the issues on appeal to be whether the bankruptcy court erred in failing to vacate or set aside, pursuant to Bankruptcy Rule 9024, its April 11, 1989 Order vacating the automatic stay on the ground that said Order was void for lack of jurisdiction pursuant to Fed.R. Civ.P. 60(b)(4).

In response, appellee states the issues to be whether the appeal should be dismissed as moot and that whether an order entered by the Bankruptcy Court which operates only on the property of the estate is void for want of jurisdiction when the relevant provisions of the Bankruptcy Code and the Bankruptcy Rules merely require notice and an opportunity to be heard.

A separate but related case, *In re Briarwood Arrowana-Limited Partnership*, File No. 1:89-cv-929-HTW was also heard by the Bank-

ruptcy Court and review by this court. On August 17, 1989 the court affirmed the decision of the Bankruptcy Court in the Briarwood case and dismissed the appeal as moot.

This matter is factually and procedurally indistinguishable from the Briarwood case. The Briarwood case raised essentially the same issues present in this matter. The court notes the parties have construed the issues somewhat differently in this case, but the court could find no difference in the essential facts to warrant a different analysis.

The court permitted supplemental material to be filed and has thoroughly reviewed the transcript. The court, despite a de novo review of this matter, cannot conclude that the Bankruptcy Court erred in its findings regarding notice in this proceeding. Additionally, the court cannot discern a tenable reason why this appeal should not also be dismissed.

Accordingly, for the identical reasons as set forth in this court's review of *In re Briarwood-Arrowana Limited Partnership*, File No. l:89-cv-929-HTW[1], this appeal is DISMISSED as MOOT. The decision of the Bankruptcy Court in this matter is AFFIRMED.

SO ORDERED, this 26th day of March, 1990.
/s/ Horace t. Ward
HORACE T. WARD
UNITED STATES DISTRICT JUDGE

---

[1] ...r adopts and incorporates the legal analysis as set forth in the *Briarwood* Order of August 17, 1989. A copy is attach... ...the convenience of the parties.

IN THE UNITED STATES DISTRICT COURT FOR THE NORTHERN DISTRICT OF GEORGIA ATLANTA DIVISION

BRIARWOOD ARROWANA-LIMITED PARTNERSHIP,

Appellant,

vs.

CIVIL ACTION
FILE NO. 1:89-CV929-HTW

SECURITY PACIFIC BUSINESS FINANCE, INC.,

Appellee.

ORDER OF COURT

This matter is currently before the court on appeal from the order of the bankruptcy court entered on May 2, 1989 denying the debtor's (appellant herein) Emergency Motion to Set Aside Order. This court has jurisdiction of this matter pursuant to 28 U.S.C. § 158(a).

Appellant states the issues on appeal to be (I) whether the bankruptcy court erred in denying the debtor's emergency motion to set aside the order lifting the stay; (2) whether the bankruptcy court erred in ruling that the requirements for notice differ as between adversary situations and contested motions; (3) whether the bankruptcy court erred in ruling that actual notice was sufficient in contested motion practice; and (4) whether the bankruptcy court erred in ruling that there was an unreasonable delay in bringing this matter before the court. In response, appellee argues; among other things, that the appeal should be dismissed as moot and that said appeal should be dismissed for failure to properly perfect and diligently prosecute.

On an appeal, the district court may affirm, modify, or reverse a bankruptcy court's judgment, order, or decree or remand with instructions for further proceedings. Findings of fact shall not be set aside unless clearly erroneous, and due regard shall be given to the opportunity of the bankruptcy court to judge the credibility of witnesses. Bankr. R. 8013. However, conclusions of law are subject to review.

This case began on December 30, 1988 with the filing of a voluntary petition under Chapter 11 of the Bankruptcy Code in the United States Bankruptcy Court for the District of Minnesota by Briarwood Arrowana-Limited Partnership, a Minnesota limited partnership (hereinafter the "debtor" or "appellant"). Venue was transferred to the United States Bankruptcy Court for the Northern District of Georgia, Atlanta Division (hereinafter the "Bankruptcy Court") on February 9, 1989.

On or about March 16, 1989 Security Pacific Business Finance, Inc. (hereinafter "Security") filed a "Motion to Lift the Automatic Stay for Absence of Insurance and Other Defaults, or for Appointment of a Trustee or Dismissal, and Objection of Use of Cash Collateral" (hereinafter the "Stay Motion"). A copy of the Motion for Stay and Notice of Assignment of Hearing (hereinafter the "Notice") were served upon counsel of record for the debtor by first class mail. The motion and notice were not served upon the debtor per se. The address of the debtor/appellant, as set forth on its statements and schedules, is the same as that of its counsel of record.

The Bankruptcy Court conducted a hearing on the Stay Motion on April 3, 1989, which hearing was not attended by any representative of the debtor. The order granting relief from the stay (the "Stay Order") was signed on April 7, 1989 and entered upon the docket on April 11, 1989. The Stay Order became final on April 25, 1989. As of that date, neither a motion for reconsideration nor an appeal was filed by the appellant.

On May 1, 1989, debtor/appellant filed an Emergency Motion to Set Aside the Relief Order (hereinafter the "Emergency Motion") and on May 2, 1989, a hearing was held on the matter. Upon hearing

argument on the motion, the Bankruptcy Court issued an oral ruling denying the Emergency Motion (hereinafter the "Oral Ruling"). Also on May 2, 1989, debtor filed a notice of appeal to this court from the final order of the bankruptcy court denying the Debtor's Emergency Motion to Set Aside the Stay Order. Debtor also requested that this court enter a stay of the order of the Bankruptcy Court pending appeal. The motion was denied. On or about May 3, 1989, appellant surrendered possession of the foreclosed properties to agents of appellee.

Appellant argues that the Stay Order was erroneously issued. Appellant acknowledges that there was actual notice of motion seeking relief from the stay. Its position is that appellant and its counsel must be served in order for service to be properly made, pursuant to Bankruptcy Rule 7004(b)(9). Appellant states that only its counsel was served, thereby rendering service of the motion defective. Appellant contends there was no jurisdiction by the Bankruptcy Court to decide the motion, absent effective service.

In response, appellee states that copies of the motion and notice of the hearing thereon were mailed to the address of the appellant in care of its attorney of record. Appellee further states, and it is uncontroverted, that the address listed for appellant's general partner is the same as that listed for its attorney of record. Appellee argues that Bankruptcy Rule 7004(b)(9) is satisfied when the debtor and its counsel have an identical address, service is made at said address, and there is actual notice.

This court notes, as did the Bankruptcy Court, that there is an absence of explanation as to why appellant delayed filing a motion to set aside the Stay Order from the time it received actual notice in early April, 1989 until May 1, 1989, after the Stay Order became final and on the eve of foreclosure. Appellant was given notice and afforded an opportunity to be heard in a timely manner.

Additionally, this court is not convinced that there was a jurisdictional concern at that phase of the bankruptcy proceeding. It appears that the Bankruptcy Court had jurisdiction over the debtor-appellant, who filed the original petition and the res, the property

itself. See 28 U.S.C. § 1334 (a) and (d). Under these circumstances, the court would conclude that the actual notice of the motion, which the Bankruptcy Court found to exist, was sufficient for that Court to make a ruling on the motion for relief from the stay. This court does not conclude that the Bankruptcy Court erred in its finding that the notice in this type of proceeding.

Moreover, considering the posture of this case on appeal, the court finds that the outcome is determined by a review of relevant case law in this Circuit.

> It is settled law in this circuit that when the debtor fails to obtain a stay pending appeal of the bankruptcy court's order setting aside an automatic stay and allowing a creditor to foreclose on property, the subsequent foreclosure and sale of the property renders moot any appeal. *In re Matos*, 790 F.2d 864, 865-66 (11th Cir. 1986) (citing *Markstein v. Massey Associates, Ltd.*, 763 F.2d 1325 (11th Cir. 1985); *In re Sewanee Land, Coal & Cattle. Inc.*, 735 F.2d 1294 (11th Cir. 1984).

The posture of this case is similar to that of the cited cases. In each of the those cases, the secured parties were granted relief from the automatic stay and were authorized to foreclose on the encumbered property. The bankruptcy and appellate courts refused to grant a stay pending appeal, the foreclosure proceeded as scheduled, and the creditor purchased the property at foreclosure. Stating as a basis the lack of power of an appellate court to rescind a foreclosure sale to a bona fide purchaser, each appellate court dismissed as moot the portion of the debtor's appeal challenging the Bankruptcy Court's order lifting the stay. This rule of law is intended to provide finality to orders of the bankruptcy courts and to protect the integrity of the judicial sale process upon which good faith purchasers rely. *Markstein*, 763 F.2d at 1327 (citation omitted).

The Eleventh Circuit Court of Appeals recently reaffirmed this line of cases in *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (11th Cir. 1988), *cert. denied*, 109 S.Ct. 69 (1988), finding that the mootness standard has continued viability in this circuit. In addition, the *Miami Center* court explained that the mootness rule also

recognizes that once a transfer to a bona fide purchaser has occurred, the court is powerless to fashion an order giving relief.

The record indicates that in the instant case there has been foreclosure on the property and transfer of the same to a bona fide purchaser. Additionally, appellant has surrendered the property to the agents of appellee, appellee's agents have managed the property since on or about May 3, 1989, and the appellee has assumed certain potential liabilities related to the management and operation of the premises. The court determines that these changes which have occurred since entry of the Stay Order are of the nature which prevents the court from restoring the parties to substantially the same position they occupied prior to entry of the Stay Order. At this time, it is practically impossible to undo the sale and return the parties to a status quo. In view of these facts and the precedent in this circuit, the court concludes that the matter pending before this court is MOOT, and the decision of the Bankruptcy Court is AFFIRMED. Accordingly, it is hereby ORDERED that this appeal is DISMISSED.

SO ORDERED, this 17th day of August, 1989.

/s/ Horace T. Ward
HORACE T. WARD
UNITED STATES DISTRICT JUDGE

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WISHING WELL-LIMITED PARTNERSHIP, a Minnesota limited partnership,	CHAPTER 11
Debtor,	CASE NO. 89-01626
SECURITY PACIFIC BUSINESS FINANCE, INC.	JUDGE ROBINSON
Movant,	
v.	
WISHING WELL-LIMITED PARTNERSHIP, a Minnesota limited partnership,	
Respondent-Debtor.	

ORDER VACATING AUTOMATIC STAY

This matter came before the Court on Security Pacific Business Finance, Inc.'s Motion to Lift the Automatic Stay for Defaults, or for Appointment of a Trustee or Dismissal, and Objection to Use of Cash Collateral (hereinafter the "Motion") on April 3, 1989. It appearing that cause exists to vacate the stay imposed by 11 U.S.C. §362 and further that the Debtor did not appear in defense of the Motion and there being no objection from the United States Trustee to the relief requested in the Motion; it is accordingly

ORDERED, ADJUDGED and DECREED that the automatic stay is hereby immediately vacated to permit Security Pacific Business Finance, Inc. to pursue its rights and remedies under its Loan Documents and applicable law.

/s/So ordered 7 April 1989 Atlanta Ga H. Robinson USBJNDGA#

IT IS SO ORDERED.
Entered at Atlanta, Georgia this ___ day of April, 1989.

HUGH M. ROBINSON, JR.
United States Bankruptcy Judge

/s/P. Steven Kratsch
P. Steven Kratsch
Georgia Bar No. 429292
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(404) 656-1800
Attorneys for Security Pacific Business
Finance Co.

UNITED STATES BANKRUPTCY COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

IN THE MATTER OF:	)
	)
WISHING WELL-LIMITED PARTNERSHIP,	)
	)Chapter 11
	)Judge Hugh Robinson
Debtor,	)Bankr. No. 89-01626HR
	)
WISHING WELL-LIMITED PARTNERSHIP, Movant,	)
	)
	)
v.	)
	)
SECURITY PACIFIC BUSINESS FINANCE, CO.	)
	)
	)
Respondent.	)

ORDER

On April 11, 1989, the court entered an order in the above-styled case granting the motion of SECURITY PACIFIC BUSINESS FINANCE, CO. ["SECURITY"] for relief from the automatic stay of 11 U.S.C. §362(a) [the "Relief Order"] to permit SECURITY to foreclose its interest in an apartment complex which is the primary asset of this estate. On May 1, 1989 the debtor filed an Emergency Motion to Set Aside the Relief Order [the "Emergency Motion"] based on Rule 60(b) (4) of the Federal Rules of Civil Procedure. Rule 60(b) (4), made applicable to this matter by Bankruptcy Rule 9024, allows the court to relieve a party from an order which is void. In its Emergency Motion, the debtor contends that the Relief Order is void because the debtor was not served with a copy of SECURITY'S motion for relief as required by Bankruptcy Rule 7004 (b) (9) and therefore the court lacks personal jurisdiction over the debtor. The court heard arguments

on the Emergency Motion on May 2, 1989 and issued a bench ruling denying same. In order to perfect the record for appellate review, the court's ruling is set forth below.

The following facts form the basis of this controversy: The debtor filed a petition under Chapter 11 of the Bankruptcy Code on December 30, 1988. SECURITY filed its motion for relief on March 16, 1989. The motion and a notice that a hearing would be held thereon on April 3, 1989 were served on the debtor's counsel of record by first class mail but were not served on the debtor. However, there is uncontroverted evidence that the debtor received actual notice. The motion and notice which were served on debtor's counsel were mailed to:

100 5th Street Suite 1100
Minneapolis, Mn. 55402

This address is also the address of the debtor's general partner as listed on the petition. Thus the address of the debtor is the same as the address of counsel for the debtor. This is because the principal of the debtor's general partner and the debtor's counsel are law partners and the above-listed address is the address of the law firm. In addition, counsel for SECURITY gave the secretary of the debtor' s general partner telephonic notice of the time, date, and subject matter of the scheduled hearing a few days prior to its occurrence.

Security's Motion for Relief from Stay was heard by this court on April 3, 1989. Neither the debtor nor anyone representing it was present at the hearing. The court entered an order granting SECURITY'S motion for relief, the "Relief Order," on April 11, 1989. The relief order became final on April 25, 1989. During the appeal period the debtor failed to file either a motion for reconsideration or an appeal.

On May 1, 1989 the debtor filed its Emergency Motion to Set Aside the Relief order. The court heard and denied same after a hearing on May 2, 1989. The court denied the motion for the following reasons:

1. Jurisdiction. The debtor relies on this court's holding in *In re Brown*, 7 B.R. 486 (Bankr. N.D. Ga. 1980) for its contention that the court lacked personal jurisdiction over the debtor due to the improper service. The court finds Brown distinguishable from this case. Brown was an adversary proceeding to determine dischargeability for which personal jurisdiction is a prerequisite. Here, for purposes of the motion for relief, the debtor has submitted itself to the jurisdiction of the court. Furthermore, personal jurisdiction should not be the focus of inquiry here, particularly as the indebtedness and obligations arising thereon were nonrecourse. The subject matter of the motion for relief is the apartment complex on which SECURITY holds the first mortgage. Thus the matter is in the nature of an in rem action. Furthermore the complex is property of the estate over which the court certainly has jurisdiction.

2. Actual notice. Notice to the debtor's counsel of record and actual telephonic notice to the debtor are sufficient under the circumstances here.

3. Good faith. Finally, there has been an unreasonable delay in bringing this matter before the court. Despite the notice to counsel of record and to the debtor, there was no appearance at the hearing and no appeal of the court's ruling. Only at the eleventh hour has the debtor filed its "emergency" motion. The court questions the debtor's good faith in so doing.

Accordingly, the debtor's Emergency Motion to Set Aside shall be and the same hereby is DENIED. SECURITY may avail itself of its legal remedies pursuant to the court's order of April 11, 1989.

IT IS SO ORDERED at Atlanta, Georgia this 7 day of Sept, 1989.

/s/Hugh Robinson
HUGH ROBINSON
UNITED STATES BANKRUPTCY JUDGE

APPENDIX 6

TEXT OF CONSTITUTIONAL PROVISION, STATUTE AND RULES

1. U.S. Constitution, Amendment V:

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases in the land or naval forces, or in the Militia, when an actual service in time of War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

2. U.S. Bankruptcy Code, 11 U.S.C. § 362(d):

On request of a party in interest and after notice and a hearing, the court shall grant relief from the stay provided under subsection (a) of this section, such as by terminating, annulling, modifying, or conditioning such stay - (1) for cause, including the lack of adequate protection of an interest in property of such party in interest; or (2) with respect to a stay of an act against property under subsection (a) of this section if - (A) the debtor does not have an equity in such property; and (B) such property is not necessary to an effective reorganization.

3. Federal Rule of Civil Procedure 60(b):

Mistakes; inadvertence; excusable neglect; newly discovered evidence; fraud, etc. On motion and upon such terms as are just, the court may relieve a party or a party's legal representative from a final judgment, order, or proceeding for the follow-

ing reasons: (1) mistake, inadvertence, surprise, or excusable neglect; (2) newly discovered evidence which by due diligence could not have been discovered in time to move for a new trial under Rule 59(b); (3) fraud (whether heretofore dominated intrinsic or extrinsic), misrepresentation, or other misconduct of an adverse party; (4) the judgment is void; (5) the judgment has been satisfied, released, or discharged, or a prior judgment upon which it is based has been reversed or otherwise vacated, or it is no longer equitable but the judgment should have prospective application; or (6) any other reason justifying relief from the operation of the judgment. The motion shall be made within a reasonable time, and for reasons (1), (2), and (3) not more than one year after the judgment, order, or proceeding was entered or taken. A motion under this subsection (b) does not effect the finality of a judgment or suspend its operation. This rule does not limit the power of a court to entertain an independent action to relieve a party from a judgment, order, or proceeding, or to grant relief to a defendant not actually personally notified as provided in Title 28, U.S.C., § 1655, or set aside a judgment for fraud upon the court. Writs of coram nobis, coram vobis, audita querela, and bills of review and bills in the nature of a bill of review, are abolished, and the procedure for obtaining any review from a judgment shall be by motion as prescribed in these rules or by an independent action.

4. Bankruptcy Rule 4001 (a)(1):

A motion for relief from an automatic stay provided by the Code shall be made in accordance with Rule 9014.

5. Bankruptcy Rule 9014:

In a contested matter in a case under the Code not otherwise governed by these rules, relief shall be requested by motion, and reasonable notice and opportunity for hearing shall be afforded the party against whom relief is sought. No response is required under this rule unless the court orders an answer to a motion. The motion shall be served in the manner provided

for service of summons and complaint by Rule 7004, and, unless the court otherwise directs, the following rules shall apply: 7021, 7025, 7026, 7028-7037, 7041, 7042, 7052, 7054-7056, 7062, 7064, 7069, and 7071. The court may at any stage in a particular matter direct that one or more of the other rules in Part VII shall apply. An entity that desires to perpetuate testimony may proceed in the same manner as provided in Rule 7027 for the taking of a deposition before an adversary proceeding. The clerk shall give notice to the parties of the entry of any order directing that additional rules of Part VII are applicable or that certain of the rules of Part VII are not applicable. The notice shall be given within such time as is necessary to afford the parties a reasonable opportunity to comply with the procedures made applicable by the order.

6. Bankruptcy Rule 7004 (b)(9);

In addition to the methods of service authorized by Rule 4(c) (2) (C) (i) and (d) F. R. Civ. P., service may be made within the United States by first class postage prepaid as follows: (9) upon the debtor, after a petition has been filed or served upon the debtor and until the case is dismissed or closed, by mailing copies of the summons and complaint to the debtor at the address shown in the petition or statement of affairs or to such other address as the debtor may designate in writing filed with the court and, if the debtor is represented by an attorney, to the attorney at the attorney's post-office address.

UNITED STATES DISTRICT COURT
FOR THE NORTHERN DISTRICT OF GEORGIA
ATLANTA DIVISION

WISHING WELL-LIMITED PARTNERSHIP,

Appellant,

CIVIL ACTION
FILE NO. 1:89-CV-930-HTW

v.

SECURITY PACIFIC BUSINESS FINANCE, INC.,

Appellee.

BRIEF OF APPELLEE SECURITY PACIFIC BUSINESS FINANCE, INC.

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TABLE OF CONTENTS

Page

TABLE OF AUTHORITIES i

BASIS OF APPELLATE JURISDICTION 1

STATEMENT OF ISSUES 2

STANDARD OF APPELLATE REVIEW 3

STATEMENT OF THE CASE 4

ARGUMENT AND CITATION OF AUTHORITY 9

A. THE INSTANT APPEAL IS MOOT AND SHOULD BE DISMISSED 9

B. THE BANKRUPTCY COURT CORRECTLY HELD THAT APPELLANT WAS NOT ENTITLED TO THE RELIEF REQUESTED IN ITS RULE 60(b) (4) MOTION 11

1. The Stay Order Is Not Void 11

a. The Bankruptcy Court Already Had The Requisite Jurisdiction To Enter The Stay Order 13

b. Contested Motions Are Served Upon Parties To Afford Notice And An Opportunity To Be Heard 15

c. Appellant Was Provided With Sufficient Notice 16

2. Appellant's Rule 60(b) (4) Motion Is Not An Appropriate And Timely Request For Relief 17

C. THE INSTANT APPEAL HAS NOT BEEN PROPERLY PERFECTED OR DILIGENTLY PROSECUTED AND SHOULD BE DISMISSED 19

CONCLUSION 21

ADDENDUM A-1

TABLE OF AUTHORITIES

CASES Page

Bonner v. City Prichard, Alabama, 661 F.2d 1206 (11th Cir. 1981) 17

Brake v. Tavormina (In re Beverly Manufacturing Corp.), 778 F.2d 666 (11th Cir. 1985) 19

Burnside v. Eastern Air Lines, Inc., 519 F.2d 1127 (5th Cir. 1975) . 17

Edwards v. Joyner, 566 F.2d 960 (5th Cir. 1987) 17

First Tennessee Bank of Chattanooga v. Brown (In re Brown), 7 Bankr. 486 (Bankr. N.D. Ga. 1980) 14

In re Matos, 790 F.2d 864 (11th Cir. 1986) 9

In re Sewanee Land, Coal & Cattle, Inc., 735 F.2d 1294 (11th Cir. 1984) 9

Markstein v. Massey Associates, Ltd., 763 F.2d 1325 (11th Cir. 1985) 9

Matter of Robmac, Inc., 8 Bankr. 1 (Bankr. N.D. Ga. 1979) 16

Meyers v. Bock Laundry Machine Co., 64 Bankr. 221 (N.D. Ohio 1986) 19

Miami Center Limited Partnership v. Bank of New York, 838 F.2d 1547 (11th Cir. 1988) 9, 10

V.T.A., Inc. v. Airco., Inc., 597 F.2d 220 (10th Cir. 1979) 11

West v. Falconer, 17 Bankr. 929 (S.D. Ill. 1982) 19

STATUTES

11 U.S.C. § 362(f) (Supp. 1989) 16, A-1

28 U.S.C. § 157(b)(2)(G) (Supp. 1989) 12, A-2

28 U.S.C. § 158 (Supp. 1989) 1, A-2

28 U.S.C. § 1334(a) (Supp. 1989) 13, A-1

28 U.S.C. § 1334(d) (Supp. 1989) ..... 13, A-I

RULES

Bankruptcy Rule 4001 ..... 16, A-2

Bankruptcy Rule 7004(b)(9) ..... passim

Bankruptcy Rule 8006 ..... 7, A-4

Bankruptcy Rule 8010 ..... 8, A-5

Bankruptcy Rule 9006 ..... 19, A-7

Bankruptcy Rule 9014 ..... 15, A-8

Bankruptcy Rule 9024 ..... 6, 11, A-9

Federal Rule of Civil Procedure 60(b) ..... passim

BASIS OF APPELLATE JURISDICTION

This Court has jurisdiction of this proceeding pursuant to 28 U.S.C. § 158(a).

STATEMENT OF ISSUES

1. Whether the instant appeal should be dismissed as moot given that this Court is prevented from restoring the parties to substantially the same positions they occupied prior to the entry of the complained of order.

2. Whether an order entered by the Bankruptcy Court which operates only on the property of the estate is void for want of jurisdiction when the relevant provisions of the United States Bankruptcy Code and the Bankruptcy Rules merely require notice and an opportunity to be heard which Appellant was afforded.

3. Whether the instant appeal which has not been properly perfected or diligently prosecuted should be dismissed.

STANDARD OF APPELLATE REVIEW

The review of a bankruptcy court's denial of a motion pursuant to Federal Rule of Civil Procedure 60(b) (4) requires the reviewing court to evaluate the validity of the underlying order or judgment. Therefore, the general standard of appellate review shall apply to this appeal: the bankruptcy court's findings of fact should not be set aside unless clearly erroneous, but that court's conclusions of law are subject to de novo review by this Court.

STATEMENT OF THE CASE

Wishing Well-Limited Partnership, a Minnesota limited partnership and the appellant herein (hereinafter "Appellant"), filed a voluntary petition for relief under Chapter 11 of the United States Bankruptcy Code (hereinafter the "Bankruptcy Code") on December 30, 1988 in the United States Bankruptcy Court for the District of

Minnesota. The primary purpose motivating the filing of the petition was to forestall foreclosure of Appellant's sole asset, an apartment complex located in Atlanta, Georgia (hereinafter the "Property"). Venue was properly transferred to the United States Bankruptcy Court for the Northern District of Georgia, Atlanta Division (hereinafter the "Bankruptcy Court") on February 9, 1989.

On March 16, 1989, Appellee filed a Motion to Lift the Automatic Stay for Defaults, or for the Appointment of Trustee or Dismissal, and Objection of Use of Cash Collateral (hereinafter the "Stay Motion"). A copy of the Stay Motion was served on, among others, the then attorney of record for Appellant, David A. Orenstein, Esq. at Estes, Parsinen & Levy, 100 Fifth Street, Suite 1100, Minneapolis, Minnesota 55401, as Appellant had not retained local counsel. Appellant's street address as set forth on its Statements and Schedules is identical to that of Mr. Orenstein's law firm.

During the week of March 27, 1989, J. Richard Wilkinson, Jr., a partner in the law firm of Smith, Gambrell & Russell, counsel to Appellee, repeatedly made telephone calls to the offices of Wishing Well G.P., Inc., the general partner of Appellant (hereinafter "General Partner"), to determine whether Appellant would acquiesce in the requested relief. Mr. Wilkinson had previously had discussions with Mr. R. Don Estes, a senior partner of Mr. Orenstein's law firm and president of the General Partner, concerning the case. None of these telephone inquiries were returned. On March 31, 1989, Melinda A. Marbes of Smith, Gambrell & Russell, telephoned Mr. Orenstein at the offices of the General Partner. Mr. Orenstein returned the call and left a message directing Ms. Marbes to speak with Mr. E. Burke Hines regarding this matter. Ms. Marbes also telephoned the offices of General Partner and was directed to and did in fact speak with Mr. Hines who is the secretary of the General Partner. During that conversation the date, time and place of the April 3, 1989 hearing on the Stay Motion were specifically discussed.

On April 3, 1989 at 11:00 a.m. a hearing on the Stay Motion (hereinafter the "Stay Hearing") was held before the Bankruptcy Court. Although Appellant, by and through its counsel and officers of the General Partner, had actual notice of the pending Stay Motion and the

Stay Hearing, no appearance was made on behalf of the Appellant. After consideration of the arguments in favor of lifting the stay, representations by the United States Trustee, Dennis M. Hall (hereinafter the "Trustee") that the Appellant had not retained local counsel, and the absence of any objection by the Trustee, the Bankruptcy Court granted the relief requested by the Stay Motion. An order lifting the automatic stay was signed by the Bankruptcy Court and entered upon the docket on April 11, 1989 (hereinafter the "Stay Order"). The Stay Order became final on April 25, 1989 as neither a motion for reconsideration nor an appeal was filed by the Appellant during that ten-day period after entry on the docket. In reliance on the Stay Order, Appellee commenced foreclosure advertisements in the Decatur-DeKalb News/Era to institute the foreclosure process. Foreclosure was advertised and scheduled for Tuesday, May 2, 1989.

On or about May 1, 1989, one day prior to the scheduled foreclosure, Appellant, by and through its counsel, filed its Motion to Vacate Order Vacating Automatic Stay Entered April 11, 1989 Pursuant To Bankruptcy Rule 9024 And Federal Rule of Civil Procedure 60(b) (4) (hereinafter the "Rule 60(b) (4) Motion"), requesting that the Bankruptcy Court set aside the Stay Order pursuant to Bankruptcy Rule 9024 and Federal Rule of Civil Procedure 60 (hereinafter, respectively, "Rule 9024" and "Rule 60"). On May 2, 1989, a hearing on the Rule 60(b) (4) Motion was held in Rome, Georgia at 11:00 a.m. After considering the record and the arguments of counsel, the Bankruptcy Court issued an oral ruling denying the Rule 60(b) (4) Motion (hereinafter the "Oral Ruling"). The Bankruptcy Court also denied Appellant's oral motion for a stay pending appeal (hereinafter the "Oral Motion").

That afternoon, following the Bankruptcy Court's denial of both the Rule 60(b) (4) Motion and the Oral Motion, Appellee proceeded with and completed foreclosure and the filing of a deed under power pursuant to its loan documents with Appellant. Later that same day, Appellant filed a notice of appeal with the Clerk of the Bankruptcy Court (hereinafter the "Notice of Appeal"), appealing from the Oral Ruling. Appellant also unsuccessfully requested that this Court enter a stay pending appeal. Appellant subsequently surrendered possession of the foreclosed property to agents of Appellee.

The Notice of Appeal was filed on May 2, 1989. Pursuant to Bankruptcy Rule 8006, Appellant filed a designation of items on the record for appeal and a statement of issues on appeal on May 10, 1989.

In a notice dated May 10, 1989 a briefing schedule for the above-captioned appeal was prescribed, requiring Appellant to serve and file its brief with the Clerk of the United States District Court for the Northern District of Georgia, Atlanta Division (hereinafter the "District Court") no later than May 25, 1989. Prior to the expiration of that time, Appellant filed a motion for extension of time for briefing citing the lack of the transcript and a written order on the Rule 60(b)(4) Motion. Appellant's motion was not opposed by Appellee and so was granted by order of this Court dated June 30, 1989 (hereinafter the "Extension Order").

The Extension Order allowed the Appellant an additional thirty (30) days within which to serve and file an appropriate appellate brief. The Extension Order required that the time be calculated from receipt of the order by appellant's counsel, however, even allowing three additional days' mailing time from the date the Extension Order was docketed, Appellant should have filed an appellate brief in conformance with Bankruptcy Rule 8010 no later than Monday, July 31, 1989. While on July 21, 1989 Appellant did file yet another motion requesting additional time to submit its brief, the Court has not granted any further extension. Appellant has yet to file any appellate brief.

ARGUMENT AND CITATION OF AUTHORITY

A. THE INSTANT APPEAL IS MOOT AND SHOULD BE DISMISSED.

"It is settled law in this circuit that when the [Appellant] fails to obtain a stay pending appeal of the bankruptcy court's . . . order setting aside an automatic stay and allowing a creditor to foreclose on property, the subsequent foreclosure and sale of the property renders moot any appeal." *In re Matos*, 790 F.2d 864 (11th Cir. 1986) (citing *Markstein v. Massey Associates, Ltd.*, 763 F.2d 1325 (11th Cir. 1985); *In re Sewanee Land, Coal & Cattle, Inc.*, 735 F.2d 1294 (11th Cir. 1984)).

In each of these cases the secured parties were excepted from the automatic stay and were authorized to foreclose on the encumbered property. The bankruptcy and appellate courts refused to grant a stay pending appeal, the foreclosure proceeded as scheduled and the creditor purchased the property at foreclosure. Citing the absolute lack of power of an appellate court to rescind a foreclosure sale to a bona fide purchaser, each court dismissed as moot that part of the debtor's appeal challenging the bankruptcy's order lifting the stay. "This rule of law is intended to provide finality to orders of the bankruptcy courts and to protect the integrity of the judicial sale process upon which good faith purchasers rely." *Markstein* at 1327 (citation omitted).

The United States Court of Appeals for the Eleventh Circuit has recently reaffirmed this line of cases in *Miami Center Limited Partnership v. Bank of New York*, 838 F.2d 1547 (llth Cir. 1988) stating that the mootness standard has continued viability in this circuit as well as others. *Id.* at 1550. Further, the *Miami Center* court rejected the debtors' arguments that the mortgage holder was not entitled to benefit from the mootness rule as the bank had not been found to be a good faith purchaser. The *Miami Center* court held that the appellee, although knowledgeable of the claims asserted in a pending appeal, is not deprived of the status of a good faith purchaser when no fraud or misconduct exists, such party has no knowledge of adverse claims, and the purchase is for value. *Miami Center* at 1554 (citations omitted). This line of cases requires that the instant appeal be dismissed as moot because the Property was sold at foreclosure to a bona fide purchaser and Appellant failed to obtain a stay pending appeal before either the Bankruptcy Court or this Court.

Further, the *Miami Center* court explained that the mootness rule also recognizes that once a transfer to a bona fide purchaser has occurred the court is powerless to fashion an order giving effective relief. This analysis applies to the instant appeal as well. This Court cannot give effective relief in this case as substantial changes in the circumstances have occurred since entry of the Stay Order. These changes effectively prevent this Court from restoring the parties to substantially the same positions they occupied prior to entry of the Stay Order. In particular, the following changes have occurred: (1)

foreclosure of the Property and transfer of the same to a bona fide purchaser; (2) the surrender of possession of the Property by Appellant to the agents of Appellee; (3) management of the Property by Appellee's agents since early May, 1989 and (4) the assumption by Appellee of certain potential liabilities related to the management and operation of the premises. The occurrence of these events precludes effective relief and necessitates that this Court dismiss this appeal as moot.

B. THE BANKRUPTCY COURT CORRECTLY HELD THAT APPELLANT WAS NOT ENTITLED TO THE RELIEF REQUESTED IN ITS RULE 60(b) (4) MOTION.

The propriety of the Bankruptcy Court's ruling is dependent upon the analysis of two distinct issues: (1) whether the underlying Stay Order is void; and (2) whether the Appellant's request for relief pursuant to Federal Rule of Civil Procedure 60(b) (4) was an appropriate remedy in the circumstances and at the time requested.

1. The Stay Order Is Not Void.

A determination of whether an order or judgment is void as contemplated by Federal Rule of Civil Procedure 60(b) (4) (hereinafter "Rule 60(b) (4)") which is made applicable to these proceedings by Rule 9024, requires this Court to decide whether in entering the Stay Order the Bankruptcy Court lacked subject matter jurisdiction, lacked jurisdiction over the parties or property affected by the order, or whether the service given failed to meet minimal due process standards. *V.T.A., Inc. v. Airco, Inc.*, 597 F.2d 220, 224 (10th Cir. 1979).

Appellant has not raised a challenge to the Bankruptcy Court's subject matter jurisdiction over the Stay Motion which is enumerated as a core proceeding under Title 11 pursuant to 28 U.S.C. § 157(b)(2)-(G). 28 U.S.C. § 157(b)(2)(G) (Supp. 1989). Further, Appellant did not argue at the May 2, 1989 hearing on its Rule 60(b) (4) Motion (hereinafter the "Rule 60(b) (4) Hearing") that notice and an opportunity to be heard were not provided. Rather, Appellant contends that the Stay Order is void because the Bankruptcy Court lacked jurisdic-

tion over Appellant and the Property. As a basis for such assertion Appellant argues that the Stay Motion was not served upon the Debtor as set forth in Bankruptcy Rule 7004(b)(9).[1] There is no dispute that Appellee did mail and deliver to the business address of the General Partner of Appellant a copy of the Stay Motion and accompanying notice of hearing, although the document was mailed and presumably received at the Appellant's address in care of its attorney. Therefore, the issue underlying the Appellant's challenge to the validity of the Stay Order focuses upon whether Bankruptcy Rule 7004(b) (9) requires the parties to serve motions within the Chapter 11 proceeding by placing duplicate copies in separate, but identically addressed envelopes, or whether when the Appellant and its attorneys are at the same address service in the manner accomplished by Appellee is in compliance with the relevant rules.

Appellant's argument that only technical compliance with Bankruptcy Rule 7009(b) (9) would be sufficient to allow entry of the Stay Order ignores several important points, namely that: (1) the Bankruptcy Court already had jurisdiction over both Appellant and the Property; (2) service of a motion, even a contested one, within the larger Chapter 11 proceeding does not require an additional, independent basis of jurisdiction; and (3) the service provided was reasonably calculated to, and in fact did, afford Appellant notice and an opportunity to be heard.

a. The Bankruptcy Court Already Had The Requisite Jurisdiction To Enter The Stay Order.

Appellant, like the plaintiff in a civil action, has voluntarily subjected itself to the jurisdiction of the Bankruptcy Court for all matters arising under Title 11 by virtue of the filing and service of its Chapter 11 petition. Through the voluntary commencement of a Chapter 11 proceeding the debtor consents to the jurisdiction of the bankruptcy court in exchange for the protections afforded by the automatic stay under 11 U.S.C. § 362 and other purposes. In addition, the Bankruptcy Court clearly has jurisdiction over the Property as 28

[1] Bankruptcy Rule 7004(1) is made applicable to the service of motions for relief from the automatic stay through Bankruptcy Rules 4001 and 9014.

U.S.C. § 1334(d) provides for "exclusive jurisdiction of all of the property, wherever located, of the debtor as of the commencement of [a case under Title 11], and of the property of the estate." 28 U.S.C. § 1344(d) (Supp. 1989). A motion for relief from the automatic stay is a core proceeding under Title 11 and thus, a matter over which a bankruptcy court has jurisdiction of the subject matter as well as the parties and property involved. See 28 U.S.C. § 1334(a) and (d) (Supp. 1989). Therefore, the Bankruptcy Court already had the requisite jurisdiction to hear and determine the Stay Motion so long as notice of same comports with elemental standards of due process. As there is no dispute over the nature of the notice afforded in pursuing the Stay Motion, the Bankruptcy Court's resolution of the Stay Motion at the 'April 3 hearing was appropriate.

Because the Bankruptcy Court had jurisdiction over both Appellant and the Property, reliance by Appellant on the case of *First Tennessee Bank of Chattanooga v. Brown (In re Brown)*, 7 Bankr. 486 (Bankr. N.D. Ga. 1980) is misplaced. Brown involved service of a complaint and summons in an adversary proceeding seeking imposition of personal liability upon the debtor/defendant. An adversary proceeding commenced under Bankruptcy Rule 7001 et (rather than Bankruptcy Rule 9001 et for motions to lift the automatic stay) is a separate proceeding which, though related to the bankruptcy case itself, requires the court to assert in personam jurisdiction over the defendant through separate service of process. Adversary proceedings such as the dischargeability proceeding initiated in Brown are at best tangentially related to case administration proceedings such as the Stay Motion, are central to the administration of a debtor's bankruptcy estate and are central to the jurisdiction and management of the case by the Bankruptcy Court.

In the instant case, jurisdiction over the Appellant and the Property already existed and the Stay Motion was consequently merely an in rem action requesting relief which would impact exclusively against the Property. The Stay Order did not and could not impose personal liability on the Appellant because the underlying debt was of a non-recourse nature and therefore, the partnership was never at risk. Thus, unlike *Brown*, jurisdiction asserted through the mailing of two documents to the same address as alleged to be necessary by Appellant

was not a prerequisite to entry of the Stay Order and therefore, the Bankruptcy Court properly held Brown is not dispositive of the instant case.

b. Contested Motions Are Served Upon Parties To Afford Notice And An Opportunity To Be Heard.

Appellant's position that Bankruptcy Rule 7004(b) (9) prescribes the manner to serve the debtor in both an adversary proceeding and motion practice is correct. However, the literal application advocated by Appellant is inappropriate under the circumstances. Bankruptcy Rule 9014 incorporates the methods of service set forth in Bankruptcy Rule 7004, but requires service of a motion in a contested matter be made in order that "reasonable notice and [an] opportunity for hearing shall be afforded the party against whom relief is sought." Bankr. R. 9014. Thus, contrary to Appellant's assertions (Transcript of the Rule 60(b) (4) Hearing at 27-28 hereinafter "Transcript"), a distinction in purpose is specified in the relevant rules. This scheme of dual purposes is more easily reconciled with the fact that there exist three distinct types of proceedings within and related to bankruptcy cases, namely: (1) adversary proceedings as defined by Bankruptcy Rule 7001; (2) administrative or uncontested matters; and (3) contested matters, *Matter of Robmac, Inc.*, 8 Bankr. 1, 3 (Bankr. N.D. Ga. 1979), to which different jurisdictional and due process requirements apply.

As further evidence that service of a relief for stay motion does not invoke jurisdictional concerns, Section 362(f) of the Bankruptcy Code and Bankruptcy Rule 4001(a) allow for relief from the stay. If service of a motion requesting relief from the automatic stay were, as Appellant contends, intended by Congress to be jurisdictional these provisions would pose serious due process requirements.

c. Appellant Was Provided With Sufficient Notice.

The Bankruptcy Court expressly held that Appellant had "actual . . . notice of the hearing date so that the [Appellant] could have appeared and made the [alleged] defect known . . . or raise any objection . . ." (Transcript at 31.) While Appellant makes much of the fact that Appellee failed to comply with the technical aspects of 7004-

(b) (9), Appellant does not deny having received actual notice of the Stay Motion and Stay Hearing. Such notice was achieved through service of the Stay Motion on Appellant's then attorney of record, telephonic conversations with both the Appellant's attorney and an officer of the Appellant prior to the time of the Stay Hearing. Additionally, Mr. Don Estes, president of the General Partner of the Appellant, telephoned undersigned counsel on the day following the hearing and was advised of the outcome of the Stay Hearing. Appellant has not disputed that actual notice was given in time to either appear at the Stay Hearing or to request other relief prior to the time the Stay Order became final, (Transcript at 15.), and therefore, the purpose of service of the Stay Motion as set forth in Bankruptcy Rule 9014 was accomplished.

2. Appellant's Rule 60(b) (4) Motion Was Not An Appropriate and Timely Request for Relief.

Appellant challenges the Bankruptcy Court's conclusion that Appellant exercised an unreasonable delay in bringing to the Court's attention its challenge to service of the Stay Motion. Generally, motions pursuant to Rule 60(b) are not substitutes for timely appeals, *Burnside v. Eastern Airlines, Inc.*, 519 F.2d 1127, 1128 (5th Cir. 1975); *Edwards v. Joyner*, 566 F.2d 960, 961 (5th Cir. 1978),[1] and should be granted only in extraordinary circumstances. *Id.* Further, Rule 60(b) expressly provides that every motion brought pursuant to that rule shall be made within a reasonable time. Such standard appears to impose a duty of diligence upon the party requesting relief when such party has notice of the alleged defect. Appellant has cited no authority for its contention that a party with notice may forego other less drastic remedies in favor of requesting relief under Rule 60(b). Rather, such argument flies in the face of the policy favoring finality and certainty of litigation which is a primary consideration underlying Rule 60(b) motions. *Id.*

[1]Cases of the former Fifth Circuit are binding precedent in the Eleventh Circuit. *Bonner v. City of Prichard, Alabama*, 661 F.2d 1206 (11th Cir. 1981).

Appellant has not satisfactorily explained the delay from the time when the Stay Motion was served and when Appellant finally brought the alleged defect to the attention of the Bankruptcy Court. Any argument that this delay cannot be deemed an unreasonable time ignores the actual circumstances of this case. First, the Stay Motion was filed and served on Appellant's attorney on or about March 16, 1989, some six weeks prior to the time Appellant filed the Rule 60(b) (4) Motion. Second, Appellant had actual notice of the Stay Motion, Stay Hearing and outcome of the Stay Hearing during the ten-day period within which the Stay Order became final. However, Appellant elected not to appear at the Stay Hearing, elected not to file a motion for reconsideration or to appeal the Stay Order, but chose instead to delay until late in the afternoon on the day immediately preceding the scheduled foreclosure to file and pursue its Rule 60(b) (4) Motion. Appellant offers no explanation for this obvious lack of diligence and unreasonable delay and cites no authority for the proposition that a party with notice may forego other less drastic remedies in favor of requesting that a final order be set aside. Therefore, the Bankruptcy Court correctly held the Rule 60(b) (4) Motion was not made within a reasonable time.

C. THE APPEAL HAS NOT BEEN PROPERLY PERFECTED OR DILIGENTLY PROSECUTED.

Appellant has failed to properly perfect and diligently prosecute the appeal. Appellant failed to file an appropriate appellate brief by the deadline of July 31, 1989 as required by the Extension Order and as calculated under Bankruptcy Rule 9006. While Appellant had filed a second motion requesting yet another extension, this Court has not entered any order granting the requested relief and thus, the Extension Order and the briefing schedule set forth therein remain in effect. This serious shortcoming evidences Appellant's failure to properly perfect and prosecute this appeal. Such failure may serve as the basis for the dismissal of this appeal, particularly when other evidence of neglect or indifference, such as Appellant's unexplained delay in initially pursuing this alleged problem, exists. See *Brake v. Tavormina (in re Beverly Manufacturing Corp.)*, 778 F.2d 666 (11th Cir. 1985); *Meyers v. Bock Laundry Machine Co.*, 63 Bankr. 221 (N.D. Ohio 1986). Such a dismissal would not "exalt form over substance [a]s [t]he time

requirements prescribed by the Rules of Bankruptcy Procedure . . . ensure that an appeal is prosecuted diligently." *West v. Falconer*, 17 Bankr. 929, 932 (S.D. Ill. 1982). Therefore, Appellant's failure to perfect this appeal by timely filing an appellate brief in conformance with the Extension Order and relevant Bankruptcy Rules warrants dismissal of this appeal.

CONCLUSION

WHEREFORE, premises considered, Appellee requests this Court: (1) dismiss the above-captioned appeal with prejudice; (2) deny Appellant's request to set aside the Stay Order, and (3) grant such other relief as is just and proper under the circumstances.

Respectfully submitted,
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